

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

|                                |   |                           |
|--------------------------------|---|---------------------------|
| UNITED STATES OF AMERICA,      | ) |                           |
|                                | ) |                           |
| Plaintiff,                     | ) |                           |
|                                | ) | Civil No. 05-CV-01452-RHK |
| v.                             | ) |                           |
|                                | ) | Hon. Richard H. Kyle      |
| DON PROW, individually and     | ) | Hon. Janie S. Mayeron     |
| d/b/a Rochester Topsoil, Inc.; | ) |                           |
| BRYCE PROW, individually and   | ) |                           |
| d/b/a Rochester Topsoil, Inc.; | ) |                           |
| and ROCHESTER TOPSOIL, INC.,   | ) |                           |
|                                | ) |                           |
| Defendants.                    | ) |                           |

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CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA") and the Secretary of the Army acting through the United States Army Corps of Engineers ("Corps"), filed the Complaint herein against Defendants Don Prow, Bryce Prow and Rochester Topsoil, Inc. ("Rochester Topsoil") (collectively, "Defendants"), alleging that Defendants violated Section 301(a), 309 and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1319 and 1344.

WHEREAS, the Complaint filed by the United States alleges that on one or more occasions between December 1998 and January 1999, the summer or fall of 2000, and/or at other times more fully known to the Defendants, the Defendants violated sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C.

§§ 1311(a) and 1344, by utilizing mechanized landclearing equipment to excavate wetlands, and by unlawfully removing vegetation, topsoil, dredged spoil, soil, rock, sand and other materials from Willow Creek, and discharging these materials onto wetlands, on property located within Sections 23 and 24, Township 106 North, Range 14 West, Rochester, Olmsted County, Minnesota ("the Site");

WHEREAS, the Complaint further alleges that on one or more occasions between December 1998 and January 1999, in April 1999, the summer or fall of 2000, and/or at other times more fully known to the Defendants, the Defendants violated sections 301(a) and 404 of the CWA by unlawfully removing vegetation, topsoil, dredged spoil, soil, rock, sand and other materials in the course of their excavation of ditches at the Site, and by discharging these materials onto wetlands and other waters of the United States;

WHEREAS, the Complaint further alleges that the Defendants again violated sections 301(a) and 404 of the CWA by failing to perform mitigation at the Site, and at another location known as "Rock Dell Farms," in accordance with "Special Conditions" contained in a permit issued to Don Prow by the Corps on February 14, 1996;

WHEREAS, the Complaint further alleges that the Defendants violated section 309 of the CWA by failing to timely

complete restoration work at the Site in the manner required by an Administrative Compliance Order issued by EPA, dated August 19, 1999, and in accordance with a Wetland Restoration Plan subsequently proposed by the Defendants and accepted by EPA;

WHEREAS, the Complaint seeks to enjoin the discharge of pollutants into waters of the United States in violation of CWA section 301, to require the Defendants to restore the waters of the United States affected by their unlawful activities, and to require Defendants to pay civil penalties, pursuant to section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d);

WHEREAS, the Defendants expressly deny the allegations and liability as alleged in the Complaint and assert that they have meritorious defenses to the allegations in the Complaint;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Site; and

WHEREAS, the parties agree that settlement of this case is in the public interest and that entry of this Consent Decree without further pretrial proceedings or a trial of any issue of fact or law in this case is the most appropriate means of resolving this matter.

NOW, THEREFORE, before the taking of any testimony upon the pleadings, without adjudication of any issue of fact or law, upon consent of the parties hereto by their authorized

representatives, and upon the Court's determination that this Consent Decree is a reasonable and fair settlement of this action which adequately protects the public interest in accordance with the CWA, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties consenting hereto pursuant to 28 U.S.C. §§ 1331, 1345 and 1355, and section 309(b) of the CWA, 33 U.S.C. § 1319(b).
2. Venue is proper in this district pursuant to section 309(b) of the Act, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b), because the Defendants conduct business in this district, the subject property is located in this district and the causes of action alleged herein arose in this district.
3. The Complaint alleges claims upon which relief can be granted pursuant to sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The provisions of this Consent Decree shall apply to and be binding upon the parties to this action, their officers, directors, agents, employees, servants, successors and assigns, and any person, firm, association or corporation who is, or will be, acting in concert or participation with the Defendants, whether or not such person has notice of

this Consent Decree. In any action to enforce this Consent Decree, the Defendants shall not raise as a defense the failure of any of their officers, directors, agents, employees, servants, successors or assigns, or any person, firm, association or corporation acting in concert or participation with the Defendants, to take any actions necessary to comply with the provisions of this Consent Decree.

5. At least seven (7) days prior to the transfer of ownership or other interest in the Site, or any portion thereof, Defendants Don Prow and/or Bryce Prow shall provide a true copy of this Consent Decree to any successor to their interest, and shall simultaneously advise the United States, in writing, at the addresses specified in Section XII below, that such notice has been given.
6. The transfer of ownership or other interest in the Site, or any portion thereof, by the Defendants shall not alter or relieve them of their obligation to comply with all of the required terms of this Consent Decree as applicable to them. At least thirty (30) days prior to the Defendants' transfer of ownership or other interest in the Site, or any portion thereof, whether by sale, lease, or otherwise, the Defendants shall notify the EPA, the Corps, the United States Department of Justice and the United States Attorney

for the District of Minnesota that such transfer may occur. In the event that the Site is transferred by reverter, the Defendants shall notify the EPA, the Corps, the United States and the United States Attorney for the District of Minnesota within thirty (30) days after such transfer. As a condition to any transfer by the Defendants of their ownership or other interest in the Site, or any portion thereof, the Defendants shall reserve all rights in the Site as are necessary to successfully comply with the terms of this Consent Decree. The Defendants shall condition such transfer upon the transferee's willingness to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

7. Defendants' compliance with this Consent Decree shall constitute a complete and final settlement of all claims and allegations set forth in the Complaint against the Defendants. Upon the termination of this Consent Decree, in accordance with Section XVII, the United States, including its agencies, departments and instrumentalities, covenants not to sue and agrees not to assert any claims or causes of action against the Defendants with respect to the allegations set forth in the Complaint against the Defendants.

8. A. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to section 404(c) of the CWA, 33 U.S.C. § 1344(c).

Notwithstanding the above, any fill material remaining and/or placed on the Site in compliance with this Consent Decree, and specifically in compliance with Paragraphs 13.B shall be deemed permitted in accordance with Corps St. Paul District General Permit 98 (GP/LOP-98-MN), issued January 31, 2000 and any successor to it (available at <http://www.mvp.usace.army.mil/regulatory>).

8. B. The Defendants intend to file an application with the Corps for the discharge of dredged or fill material, similar in nature and scope to application No. 93-07006-IP-BCN. The parties agree that the Defendants may properly file said application after the Defendants' (a) satisfactory completion of all

necessary restoration work at the Site, as more fully described in the Attachment to this Consent Decree, and (b) commencement of earth moving and other required mitigation activities at "Rock Dell Farms," as more fully described in Section IV of this Consent Decree ("Injunctive Relief").

9. This Consent Decree in no way affects or relieves the Defendants of their responsibilities to comply with any federal, state, or local law, regulations or permit.
10. This Consent Decree in no way affects the rights of the United States as against any person not a party hereto.
11. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.
12. With the exception of Paragraphs 1, 2 and 3 above, which for purposes of this Consent Decree the Defendants do not contest, nothing in this Consent Decree shall constitute an admission of fact or law by any party.

#### IV. INJUNCTIVE RELIEF

13. A. Except as otherwise provided in this Consent Decree, the Defendants and Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies



with the provisions of the CWA and its implementing regulations.

13. B. Defendants are ordered to and hereby agree to commence and complete performance of restoration and mitigation measures at the Site and at "Rock Dell Farms," as described below, within the time periods specified herein. Defendants shall commence and complete performance of those restoration and mitigation measures at the Site which EPA deems to be necessary to restore lost ecological functions of Willow Creek, as presently configured, and the filled wetlands described in the Complaint. Restoration and mitigation measures required under this subparagraph, which are more fully described in the proposed work plan for "Willow Creek Restoration and Rock Dell Farm Wetland Mitigation," attached as the "Attachment" to this Consent Decree, shall include the performance of ditch plugging and relocation of previously sidecast materials; creation of a 15.02 acre mitigation project at "Rock Dell Farms," similar to that required in the Corps' February 14, 1996 permit for the Site; the removal of sidecast material dredged from Willow Creek to the "Created Pond" and upland areas; the regrading of the channel sides of Willow Creek, stabilized with biodegradable natural fiber mats and vegetation; the installation of a Willow Creek channel check dam; and the

successful seeding, planting, revegetation and monitoring of all affected areas. All "existing stockpile" spoils on the Site (as depicted in drawing C-01 included with the Attachment) shall be used for restoration work required under this subparagraph, and any excess material shall be removed to uplands, within one (1) year from the date of entry of this Consent Decree. Upon the entry of this Consent Decree, the proposed work plan for "Willow Creek Restoration and Rock Dell Farm Wetland Mitigation," including the timetable and procedures for the restoration work described therein, shall be made part of and incorporated into this Consent Decree. All work performed in accordance with this subparagraph shall be satisfactorily completed in accordance with the deadlines established in the proposed work plan for "Willow Creek Restoration and Rock Dell Farm Wetland Mitigation," and this Consent Decree.

V. CIVIL PENALTY

14. Defendants shall pay a civil penalty in the amount of \$250,000.00 to the United States within thirty (30) days after this Consent Decree is entered by the Court. Interest on any unpaid balance shall accrue from the date the first payment is due until final payment is received, at the statutory judgment rate set forth at 28 U.S.C. § 1961, compounded annually. The interest shall be computed daily

from the time that payment is due until the date any final payment is made.

15. Defendants shall make the above-referenced payment or payments by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (# 2001V00783), EPA Region 5 and DOJ case number 90-5-1-1-16552. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorneys' Office for the District of Minnesota. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.
16. Upon payment of the civil penalty/ies required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section XII of this Consent Decree, that such payment was made in accordance with paragraph 15.
17. Civil penalty payments pursuant to this Consent Decree (including stipulated penalties under Section XI are penalties within the meaning of section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R.

§ 1.162-21, and are not tax deductible expenditures for purposes of federal law.

VI. RESTORATION, MITIGATION AND PRESERVATION

18. Any restoration and mitigation work performed in accordance with paragraph 13.B shall conform to the terms and conditions stated in the proposed work plan for "Willow Creek Restoration and Rock Dell Farm Wetland Mitigation," attached as the Attachment to this Consent Decree. The Defendants shall file with the County Recorder for Olmsted County a Notice with abstract summarizing the requirements of this Consent Decree relating to the Site. Following the termination of this Consent Decree, in accordance with Section XVII, the Defendants may file a Notice with the County Recorder certifying that the requirements of the Consent Decree have been fulfilled and the Consent Decree terminated.

VII. NOTICES AND OTHER SUBMISSIONS

19. Within 10 days after the deadline for submitting notice to the Corps and EPA as set forth in Appendix B and C to the Attachment, Defendants shall provide the United States Department of Justice and the United States Attorney for the District of Minnesota with written notice, at the addresses specified in Section XII of this Consent Decree, of whether or not that task has been completed.

20. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.
21. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendants shall, individually or by signature of a senior management official, certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VIII. RETENTION OF RECORDS AND RIGHT OF ENTRY

22. Until two (2) years after entry of this Consent Decree, Defendants shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in the Attachment, regardless of any corporate retention policy to the contrary. Until two (2) years after entry of this Consent

Decree, Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in the Attachment.

23. At the conclusion of the document retention period, Defendants shall notify the United States at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, Defendants shall deliver any such records or documents to EPA and the Corps. The Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendants assert such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld from EPA on the grounds that they are privileged.

24. A. Until termination of this Consent Decree, the United States and its authorized representatives shall have authority at all reasonable times to enter the Site, and Defendants' property at "Rock Dell Farms," to:

- (1) monitor the activities required by this Consent Decree;
- (2) verify any data or information submitted to the United States;
- (3) obtain samples;
- (4) inspect and evaluate Defendants' restoration and/or mitigation activities; and
- (5) inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Defendants as authorized by law.

#### IX. DISPUTE RESOLUTION

25. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants to attempt to resolve such

dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within twenty-eight (28) days after the end of the informal negotiations period, the Defendants files a motion with the Court seeking resolution of the dispute. Before the Defendants file any such motion, they shall, within seven (7) days after the end of the informal negotiations period, notify the United States of their intent to do so in accordance with the requirements of Section X of this Consent Decree. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.



26. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.
27. Except as provided in Section XI below, regarding payment of stipulated penalties, the filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree.

X. FORCE MAJEURE

28. Defendants shall perform the actions required under this Consent Decree within the time limits set forth or approved herein, including complying with any timetables submitted to and approved by the Corps and EPA, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as

any event arising from causes beyond the control of Defendants (including their employees, agents, consultants and contractors) which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state, or local permits, provided that any delay in receiving any state or local permit shall constitute a Force Majeure event where (a) such permit is shown, to the reasonable satisfaction of the United States, to be one which is necessary for the implementation of Section IV of this Consent Decree ("Injunctive Relief"), and (b) the application for such permit is shown, to the reasonable satisfaction of the United States, to have been timely made and complete.

29. If Defendants believe that a Force Majeure event has affected their ability to perform any action required under this Consent Decree, Defendants shall, within seven (7) calendar days after the event, notify the United States at

the addresses stated in Section XII of this Consent Decree. Within fifteen (15) calendar days after the event, Defendants shall provide supplemental notice which describes in detail the action that has been affected, the anticipated length of time of the delay, the precise cause or causes of the violation, the measures taken or to be taken by the Defendants to prevent or minimize the violation, and the schedule for the implementation of such measures. Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. If the United States determines that the conditions constitute a Force Majeure event, the time for performance of the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with EPA and, when so instructed, the Corps, to determine when to begin or resume the operations that had been affected by any Force Majeure event. The United States shall not unreasonably delay its determination of whether conditions constitute a Force Majeure event under this paragraph.

30. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of

time for fulfilling the provision should be extended, any party may seek a resolution of the dispute under the procedures in Section IX ("Dispute Resolution") of this Consent Decree.

31. Defendants shall bear the burden of proving (1) that the violation was caused by circumstances beyond their control or the control of any entity they controlled, including consultants and contractors; (2) that the Defendants or any entity controlled by them could not have reasonably foreseen and prevented such violation; and (3) the number of days of violation that were caused by such circumstances.

XI. STIPULATED PENALTIES

32. After the entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of this Consent Decree, including complying with any timetables contained in the Attachment to this Consent Decree, Defendants shall be liable for stipulated penalties to the United States for each violation of each requirement of this Consent Decree as follows:

- |  |                      |
|--|----------------------|
| (a) For day 1 up to and including<br>day 30 of non-compliance  | \$500.00/per<br>day  |
| (b) For day 31 up to and including<br>day 60 of non-compliance | \$1000.00/per<br>day |
| (c) For day 61 and beyond of                                   |                      |

non-compliance

\$2000.00/per  
day

Such payments shall be made without demand by the United States and on or before the last day of the month following the month in which the stipulated penalty accrued. In the absence of a demand, the Defendants' failure to pay a stipulated penalty shall not itself be a violation of this Consent Decree which subjects the Defendants to additional stipulated penalties under this paragraph.

33. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section IX and/or the Force Majeure provisions in Section X shall be resolved by motion to this Court as provided in Paragraphs 25 and 26.
34. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue,

stipulated penalties shall be paid by the Defendants as provided in this Section.

35. To the extent Defendants demonstrate to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 28 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.
36. In the event that a stipulated penalty payment is applicable and not made on time, interest will be paid at the statutory judgment rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.
37. Defendants shall make the payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (# 2001V00783), EPA Region 5 and DOJ case number 90-5-1-1-16552. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorneys' Office for the District of Minnesota. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business

day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section XII of this Consent Decree.

XII. ADDRESSES FOR SUBMISSIONS

38. All notices and communications to the parties required under this Consent Decree shall be made through each of the following persons and addresses:

A. TO EPA:

ROBERT H. SMITH, Esq.  
U.S. Environmental Protection Agency (C-14J)  
Region 5  
77 W. Jackson Blvd.  
Chicago, Illinois 60604  
(312) 886-0765

GREGORY CARLSON  
U.S. Environmental Protection Agency (WW-16J)  
Region 5  
77 W. Jackson Blvd.  
Chicago, Illinois 60604  
(312) 886-0124

B. TO THE CORPS:

District Counsel  
U.S. Army Corps of Engineers  
St. Paul District  
190 Fifth Street East  
St. Paul, Minnesota 55101-1638

C. TO THE UNITED STATES DEPARTMENT OF JUSTICE:

Chief, Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Re: 90-5-1-1-16552

D. TO THE UNITED STATES ATTORNEY FOR THE  
DISTRICT OF MINNESOTA:

FRIEDRICH A.P. SIEKERT, Esq.  
Assistant United States Attorney  
District of Minnesota  
600 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
(612) 664-5600

E. TO THE DEFENDANTS

Don Prow  
Rochester Topsoil  
3651 Valleyhigh Drive Northwest, Suite B  
Rochester, MN 55901

Daniel E. Berndt, Esq.  
Dunlap & Seeger, P.A.  
206 South Broadway, Suite 505  
P.O. Box 549  
Rochester, MN 55903

XIII. COSTS OF SUIT

39. Each party shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

XIV. PUBLIC COMMENT

40. The Defendants consents to the entry of this Consent Decree without further notice. The parties agree and acknowledge



that after the lodging of this Consent Decree, and prior to its entry, the United States shall, pursuant to 28 C.F.R. § 50.7, publish a public notice of and provide an opportunity for public comment on this Consent Decree. The United States reserves the right to withhold or withdraw its consent to entry of this Consent Decree based upon such public comments.

XV. CONTINUING JURISDICTION OF THE COURT

41. The Court shall retain jurisdiction of this action until termination of this Consent Decree in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree. During the pendency of the Consent Decree, either party may apply to the Court for any relief necessary to construe and effectuate this Consent Decree.

XVI. MODIFICATION

42. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Except as otherwise provided in this Consent Decree, any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendant and approved by the Court.

XVII. TERMINATION

43. If the Defendants fully and satisfactorily implement the requirements of this Consent Decree, EPA, absent changed factual information, shall consider such implementation as full compliance with the August 19, 1999 Administrative Compliance Order, Docket No. V-404-AO-99-08.
44. This Consent Decree may be terminated by either of the following:
- A. Defendants and the United States may at any time make a joint motion to the Court for termination of this Consent Decree or any portion of it; or
  - B. Defendants may make a unilateral (and unopposed) motion to the Court to terminate this Consent Decree after Defendants have demonstrated to the satisfaction of the United States that Defendants have complied with all terms of this Consent Decree (including the payment of all penalties and monetary obligations hereunder), provided that:
    - 1. Defendants shall first certify their compliance with this Consent Decree to the Court and the United States, and
    - 2. within forty-five (45) days of receiving

such certification from the Defendants, the United States has not contested in writing that such compliance has been achieved. If the United States disputes Defendants' full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court. The United States' non-opposition to Defendants' motion to terminate this Consent Decree, when filed in accordance with this paragraph, shall not be unreasonably withheld, conditioned, or delayed.

IT IS SO ORDERED.

Dated and entered this \_\_\_\_ day of \_\_\_\_\_ 2006.

BY: \_\_\_\_\_

United States District Judge  
United States District Court  
for the District of Minnesota

CONSENTED TO:

FOR THE DEFENDANTS BRYCE PROW, DON PROW AND ROCHESTER TOPSOIL, INC.

Donald Lee Prow

DATED: 11-22-08

DONALD LEE PROW

Daniel E. Berndt

DATED: 12-22-05

DANIEL E. BERNDT, ESQ.  
Dunlap & Seeger, P.A.  
206 South Broadway, Suite 505  
P.O. Box 549  
Rochester, MN 55903

FOR THE PLAINTIFF, THE UNITED STATES OF AMERICA:

SUE ELLEN WOOLDRIDGE  
Assistant Attorney General  
Environment and Natural Resources Division

BY: Joshua M. Levin

DATED: FEBRUARY 16, 2006

JOSHUA M. LEVIN  
Senior Trial Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-4198

RACHEL K. PAULOSE  
United States Attorney  
District of Minnesota

BY: Friedrich A.P. Siekert  
FRIEDRICH A.P. SIEKERT  
Assistant United States Attorney  
District of Minnesota  
600 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
(612) 664-5600

DATED: 3/2/06



DATED: 1 February 2006

EDWIN C. BANKSTON

District Counsel

U.S. Army Corps of Engineers, St. Paul District

Walker B. Smith


DATED: 2/10/06

WALKER B. SMITH  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

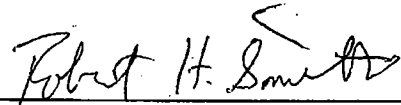
Thomas J. Charlton

DATED: Jan 23, 2006

THOMAS CHARLTON  
Attorney Advisor  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

  
\_\_\_\_\_  
THOMAS V. SKINNER  
Regional Administrator

DATED: 2-6-06

  
\_\_\_\_\_  
ROBERT H. SMITH, ESQ.  
Associate Regional Counsel  
United States Environmental Protection Agency  
Office of Regional Counsel, Region 5

DATED: 1/18/06

Re: UNITED STATES OF AMERICA

✓  
DON PROW, Individually and  
d/b/a Rochester Topsoil, Inc.;  
BRYCE PROW, individually and  
d/b/a Rochester Topsoil, Inc.;  
and ROCHESTER TOPSOIL, INC.,

**CREATION AND GRANT OF  
COVENANTS**

This GRANT OF THESE COVENANTS is made by Donald Lee Prow d/b/a Rochester Topsoil, Inc., residing at 1833 16½ Street, N.W., Rochester, MN 55901 (hereinafter referred to collectively as the "Covenantor") to the United States Army Corps of Engineers, (hereinafter referred to as "Government").

**WITNESS THAT:**

WHEREAS, the Covenantor is the owner in fee of certain real property located in the County of Olmsted, in the State of Minnesota, described more particularly as follows, and referred to herein as the "Conservancy Area":

W 1/2 of the NW 1/4, Section 34, Township 105 North, Range 15 West, Olmsted County, Minnesota;

WHEREAS, the Covenantor desires and intends that the natural elements and the ecological and aesthetic values of the Conservancy Area be maintained and improved in accordance with the terms and conditions of these Covenants; and

WHEREAS, the Covenantor and Government both desire, intend and have the common purpose of conserving and preserving in perpetuity the Conservancy Area in a relatively natural condition by placing restrictions on the use of the Conservancy Area and by assigning from the Covenantor to the Government, by the establishment of these Covenants, affirmative rights to ensure the preservation of the natural elements and values of the Conservancy Area; and

WHEREAS, these covenants constitute part of the environmental compensatory mitigation that were required under Department of the Army permit number 1993-7006-BCN and that the permit would not have been granted except for the creation of these covenants.

WHEREAS, these covenants, are part of the environmental compensatory mitigation agreed to by the Covenantor under the



Consent Decree dated \_\_\_\_\_, 2006 to resolve their violation of the Clean Water Act - Civil Action No. 05-1452 RHK/JSM.

NOW THEREFORE, the Covenantor, for valuable consideration received, does hereby establish, give and assign to the Government an assignable right to enforce the following restrictions against the Covenantor, its successors and assigns if any; any third party holding, or professing to hold, any legal or equitable title to the Conservancy Area; or any trespasser or interloper committing any act on or near the premises inconsistent with these covenants:

- a. The right of the Government to enforce by proceedings at law or in equity the Covenants hereinafter set forth. The right shall include but not be limited to, the right to bring an action in any court of competent jurisdiction to enforce the terms of these Covenants, to require the restoration of this property to its natural condition or to enjoin non-compliance by appropriate injunctive relief. The Government does not waive or forfeit the right to take action as may be necessary to ensure compliance with terms of these Covenants by any prior failure to act. Nothing herein shall be construed to entitle the Government to institute any enforcement action against the Covenantor for any changes to the Conservancy Area due to causes beyond the Covenantor's control and without the Covenantor's fault or negligence (such as changes caused by fire, flood, storm, civil or military authorities undertaking emergency action or unauthorized wrongful acts of third parties).
- b. The right of the Government, its contractors, agents and invitees, to enter the Conservancy Area, in a reasonable manner and at reasonable times, for the purpose of inspecting the Conservancy Area to determine if the Covenantor is complying with the Covenants and promises, and further to observe, study, record and make scientific studies and educational observations.

AND IN FURTHERANCE of the foregoing affirmative rights, the Covenantor makes the following covenants on behalf of themselves and their heirs, successors and assigns, which covenants shall run with and bind the Conservancy Area in perpetuity:

#### COVENANTS

- a. USES. There shall be no commercial, industrial or residential activity undertaken or allowed within the Conservancy

Area.

b. BUILDINGS AND STRUCTURES. There shall be no buildings, dwellings, barns, roads, advertising signs, billboards or other structures built or placed in the Conservancy Area.

c. TOPOGRAPHY. There shall be no dredging, filling, excavating, mining, drilling or removal of any topsoil, sand, gravel, rock, minerals or other materials. There shall be no plowing or any other activity that would alter the topography of the Conservancy Area.

d. DUMPING/DISPOSAL. There shall be no dumping of trash, ashes, garbage or other unsightly or offensive material, especially including any hazardous or toxic waste.

e. WATER. The hydrology of the Conservancy Area will not be altered in any way or by any means including pumping, draining, diking, impounding or diverting surface or ground water into or out of the Conservancy Area.

f. AGRICULTURAL USES. No plowing, tilling, cultivating, planting, timbering, or other agricultural activities may take place within the Conservancy Area.

g. The Covenantor is responsible for compliance with all federal, state and local laws governing the safety and maintenance of the property, including the control of noxious weeds within the Conservancy Area.

h. There shall be no operation of any motorized watercraft, vehicle, or equipment within the Conservancy Area.

i. VEGETATION. Except in conjunction with the authorized uses set forth in paragraph g. above, there shall be no removal, cutting, mowing or alteration of any vegetation or change in the natural habitat in any manner.

NOTWITHSTANDING the foregoing restrictions, the Covenantor may construct and maintain any project features or mitigation features expressly required by the Consent Decree.

#### **RESERVED RIGHTS**

These covenants do not require the Covenantor to allow the general public to enter upon or use the Conservancy Area.

The Covenantor and Covenantor's invitees may hunt and fish in the Conservancy Area so long as they comply with all federal, state and local game and fishery regulations.

Nothing herein shall be construed as limiting the right of the Covenantor to sell, give or otherwise convey the Conservancy Area, or any portion or portions thereof, provided that the conveyance is subject to the terms of these Covenants.

#### GENERAL PROVISIONS

These Covenants shall run with and burden the Conservancy Area in perpetuity and shall bind the Covenantor and Covenantor's heirs, successors and assigns. These Covenants are fully valid and enforceable by any assignee of the Government, whether assigned in whole or in part. Said assignment may be by operation of law or by written notice of assignment to the Covenantor.

The Covenantor warrants that he/she/it owns the Conservancy Area in fee simple, and that Covenantor either owns all property interests in the Conservancy Area which may be impaired by the granting of these Covenants or that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Conservancy Area which have not been expressly subordinated to these Covenants by signing below. If it is determined at any time that there is any party who may have a property interest in the Conservancy Area that is superior to these Covenants, then the Covenantor shall immediately obtain and record a consent and subordination agreement signed by the other party. Acceptance of these Covenants does not release the Covenantor from the obligation to obtain and record a consent and subordination agreement signed by any party who may have a property interest in the Conservancy Area that is superior to these Covenants, even if such interest was of record at time of acceptance.

The Covenantor agrees to pay any and all real property taxes and assessments levied by competent authority on the Conservancy Area.

The Covenantor agrees that the terms, conditions, covenants and restrictions set forth in this instrument will be inserted in all subsequent conveyance(s) of any interest in said property. The Covenantor agrees to notify the Government of any such conveyance in writing and by certified mail within 15 days after the conveyance.

The Government may assign or transfer the right to enforce these Covenants to any Federal or state agency or private conservation organization for management and enforcement.

The term "Covenantor" as used herein shall be deemed to include the Covenantor and his/her/its heirs, successors, personal representatives, executors and assigns. The term "Government" shall be deemed to include the United States Government, acting by and through the U.S. Army Corps of Engineers, and its assigns.

TO HAVE AND TO HOLD the above described together with all

the appurtenances, rights and privileges belonging thereto, either in law or equity, for the proper use and benefit of the Government and its successors and assigns, forever.

**EXECUTIONS AND ACKNOWLEDGMENTS**

IN WITNESS THEREOF, the Covenantor has hereto set their hand this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

County of \_\_\_\_\_ )  
State of Minnesota )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, by \_\_\_\_\_ and \_\_\_\_\_  
(name(s) with marital status).

[ SEAL ]

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

**CONSENT AND SUBORDINATION**

The undersigned consent and subordinate to the foregoing Creation and Grant of Covenants for the Conservancy Area.

SIGNATURE OF MORTGAGEE, IF ANY:

\_\_\_\_\_  
(Name of Mortgagee)

By: \_\_\_\_\_

Its: \_\_\_\_\_

County of \_\_\_\_\_ )  
 )  
State of Minnesota )

This instrument was acknowledged before me this \_\_\_\_\_ day of  
\_\_\_\_\_, 2006 by \_\_\_\_\_ the \_\_\_\_\_,  
of \_\_\_\_\_ a \_\_\_\_\_ under the laws of \_\_\_\_\_.

[ SEAL ]

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

SIGNATURE OF HOLDER OF OTHER  
INTEREST IN REAL PROPERTY, IF ANY: \_\_\_\_\_  
\_\_\_\_\_

County of \_\_\_\_\_ )  
 )  
State of Minnesota )

This instrument was acknowledged before me this \_\_\_\_\_ day of  
\_\_\_\_\_, 2006, by \_\_\_\_\_  
(name(s) with marital status).

[ SEAL ]

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

IF THERE ARE ADDITIONAL HOLDERS OF INTERESTS IN THE REAL  
PROPERTY, CHECK HERE [ ] AND ATTACH ADDITIONAL SIGNATURE PAGES  
FOR THEIR CONSENT AND SUBORDINATION



**GES**  
*Graham Environmental Services, Inc.*

**ATTACHMENT**

**Rochester Topsoil, Inc.**  
Willow Creek Restoration and Rock Dell Farm Wetland Mitigation  
Work Plan

**Rochester, Minnesota**



2003 aerial photograph of the Willow Creek site.

**January 18, 2006**

GES Project No. 2005.109

Rochester Topsoil, Inc.  
Willow Creek Restoration and Rock Dell Farm Wetland Mitigation  
Rochester, Minnesota

**Work Plan**  
01/18/06

**1. Introduction:**

The purpose of the **Work Plan** is to provide a text document that consolidates the plans, requirements and understandings of what will be done on the site as part of the Consent Decree to resolve: United States of America v. Don Prow, individually and d/b/a Rochester Topsoil Inc.; Bryce Prow, individually and d/b/a Rochester Topsoil, Inc; and Rochester Topsoil Inc. (D. Minn.). This work plan specifies the work that remains to be completed under the 2000 Barr plans for the restoration of the Willow Creek site and the 2005 MFRA plans for Rock Dell Farm. Where this plan references the locations of spoil piles as depicted on the Barr plan sheets, it is implied to include any spoil piles that resulted from the Prows actions and were documented in photographs provided by the EPA. Where seed mixes differ between the plan sheets and this work plan, the work plan shall take precedence because the seed mixes are essentially the same, but have been renamed over the past five years. This narrative description has been broken into sections to facilitate the discussion and resolution of specific elements. During implementation of this agreement many of the related elements will be combined and the construction sequencing will dictate the schedule of completion of each element. The limits of construction will be clearly marked in the field and the contractor shall limit their construction activities to the construction limits shown on Figure 1 and/or the Barr plan sheet C-01.

**2. 2000 Restoration Requirements That Have Been Completed and/or Are No Longer Relevant.**

- a. Ditch 1 has been restored and the area has been revegetated. See 3.c. below for remaining work in this area.
- b. Ditch 2 has been restored and the area has been revegetated.
- c. Ditch 3 Spoil on the east side of the South Fork of Willow Creek has been removed and relocated per the 2000 plan. See 3.f. for verification of this work.
- d. Ditch 5 has subsequently been graded and filled as part of a separate MnDoT project that was permitted by the Corps of Engineers (COE).

**3. Required Willow Creek Site Work.**

- a. A culvert crossing will be constructed across Ditch 4 at a location to be determined to provide access to side cast and spoils on the south side of Willow Creek. The Minnesota Department of Natural Resources will be

consulted to determine the need for a protected waters alteration permit for crossing Ditch 4.

- b. South Fork of Willow Creek spoil piles (from the confluence of Ditch 4, east to the confluence with the original Willow Creek/Ditch). Barr plan sheet C-01 shows the locations where spoil piles were side cast when beaver dams were removed and these sections of the ditch/creek were cleared. These areas will be mowed to more clearly identify the spoil piles. The spoil piles will be cleared and grubbed and the spoil placed back into the channel to create the stream channel profiles as specified on Barr plan sheets C-02 and C-04. The top of the bank on the east side of the channel will be restored by seeding and installation of wood fiber blankets per the specification on plan sheet 2/4. Disturbed areas above the channel banks will be seeded with MnDoT seed mix 26B and mulched.
- c. Ditch plug at the north end of ditch 1. As part of the channel restoration described in a. above, the remnants of the north end of ditch 1, which was previously restored, will be plugged and restored as part of the channel bank. This is specific to the area where the man-made ditch 1 was connected to the South Fork of Willow Creek and is not intended to block the natural swale immediately to the east of the former ditch. The bank of the channel will be restored by seeding and installation of wood fiber blankets per the specification on plan sheet 2/4. Disturbed areas above the channel banks will be seeded with MnDoT seed mix 26B and mulched.
- d. Spoil piles along the east end of Willow Creek /Ditch. Barr plan sheet C-01 shows the locations where spoil piles were side cast when beaver dams were removed and this section of the ditch/creek were cleared. These areas will be cleared and grubbed, and the spoil piles removed to the "created pond", Ditch 4 (see 3.i. below) and/or an upland location. Areas along the south bank of the channel that are steeper than 2:1 will be regraded to 2:1. Disturbed banks of the channel will be restored by seeding and installation of wood fiber blankets per the specification on plan sheet 2/4. Disturbed areas above the channel banks will be seeded with MnDoT seed mix 26B and mulched.
- e. Ditch plug/restoration of swale east of the South Fork of Willow Creek (along the existing access road on the south edge of the site. Some minor cleaning of this section of the ditch was done and is required to be restored. The Field access ramp is needed for the project construction and removing the ramp and the eight inch culvert may actually facilitate more drainage from this ditch to the South Fork of Willow Creek. Restoration of this area will be accomplished by installing an elbow and riser on the upstream end of the pipe to establish an outlet at approximately the same elevation as prior to the ditch cleaning. The elevation of the outlet will be set during construction with consultation with the EPA representative and the assistance of a surveyor. The elevation of the riser will be recorded with the as-built survey. The area immediately north of the ditch will be mowed to more clearly identify the spoil piles. The spoil piles will be replaced in the ditch or hauled to an upland area.



- f. Spoil piles along the east side of the straight section of the South Fork of Willow Creek. The spoil piles in this area are identified on the Barr plan sheet C-01 and were believed to be removed to an upland area in 2000. This area will be mowed to more clearly identify any remaining spoil piles. If present, spoil will be removed to an upland area and the disturbed areas above the channel banks will be seeded with MnDoT seed mix 26B and mulched.
- g. Install Willow Creek Check Dam. A rock rip-rap check dam will be installed in the 1950's Willow Creek channel/ditch at station 12+00 per the details on the Barr plan sheets C-03 and C-04.
- h. Divert Willow Creek back into its 1950's channel/ditch. After the channel bank grading, seeding and check dam work is completed, Willow Creek will be diverted back into its 1950's channel/ditch by placing a ditch plug in the south bank at the head of Ditch 4. The ditch plug will be constructed to tie into the existing Willow Creek bank on the east and west side of the mouth of Ditch 4. The ditch plug will be constructed with native soils, placed and compacted in 12 inch lifts. The bank of the channel will be restored by seeding and installation of wood fiber blankets per the specification on plan sheet 2/4. Disturbed areas above the channel banks will be seeded with MnDoT seed mix 26B and mulched. Once this ditch plug is stabilized, there is no on going requirement to restore or maintain the channel location if future flooding events breach the channel banks.
- i. Ditch 4 will be restored to the grade of the adjacent ground. Most of the spoil from Ditch 4 was replaced in the channel in 2000. After Willow Creek is diverted back into its 1950's channel/ditch, Ditch 4 will be regraded. Fill will be placed in the ditch to bring it level with the top of its banks from where it currently connects to Willow Creek to where it connects to the South Fork of Willow Creek. Existing beaver dams in ditch 4 will be removed as needed to facilitate this restoration task.

#### **4. Required Rock Dell Farm Site Work.**

- a. Phase 1 of the Rock Dell Farm wetland mitigation will be constructed as shown on MFRA plan sheet 4/4. Phase 2 is intended to be constructed as part of a future project permit and mitigation plan. Phase 1 will create 15.02 acres of new wetlands in a series of shallow marshes. In addition 11.62 acres of uplands around the marshes will be established in native prairie. A restrictive covenant will be placed over the created marshes and surrounding upland buffers. During site grading on-site topsoil will be segregated so that eight to ten inches of topsoil can be spread over the mitigation area to establish the final site grades. The areas within the shallow terrace marshes will be seeded with MnDoT seed mix 26B. The dikes between the marshes and the surrounding upland will be seeded with MnDoT seed mix 350 and mulched. Disturbed areas outside of the buffer area that will not be cropped in the future will be seeded with MnDoT seed mix 250 and mulched. The over flow structures in each

basin will be constructed as shown in the detail on plan sheet 4/4, and will be protected with rock rip-rap.

**5. Stream Bank Restoration and Erosion Control.**

- a. Seed mixes, rates, and locations. All areas disturbed during construction will be seeded per MnDoT spec. 3876. The specific seed mixture composition and rates to be used are attached in Appendix A. On the Willow Creek site MnDoT seed mix 26B will be used in all of the restoration areas to create a native wetland plant community. MnDoT seed mix 100B or 110B will be used on all temporary stockpiles of soil. On the Rock Dell farm site, MnDoT mix 26B will be used in the created wetland basins. The adjacent upland areas within the restrictive covenant area will be seeded with MnDoT mix 350 with the SE forbs mix to create a native prairie plant community. Areas at the Rock Dell farm site, disturbed by construction but out side of the restrictive covenant, will be seeded with MnDoT seed mix 250 unless the area will continue to be cropped.
- b. Erosion control blanket on disturbed channel banks and slopes steeper than 3:1. Erosion control blanket will be installed on the finished stream banks from the toe of the slope to the top of the bank (Figure 2) after the area has been seeded. Six inch staples at an average of 1.4 staples per square yard will be used to secure the erosion control blanket to the ground. The erosion control blanket will be a commercially available product consisting of a straw and or coconut fiber mat between jute netting (no polypropylene netting).
- c. Mulch all disturbed areas beyond the channel banks. Type 1 mulch (MnDoT spec. 3882 will be applied at a rate of 2 tons/acre to seeded areas that do not get erosion control blanket installed. Generally this is disturbed areas beyond the creek banks on the Willow Creek site, and any disturbed are on the Rock Dell Farm mitigation site. The mulch will be blown onto the seeded area and lightly disk anchored per MnDoT spec. 2575.3F.1.

**6. Vegetation Performance Standards, Monitoring, and Management.**

- a. All areas disturbed by construction will be revegetated. In addition some areas which were previously disturbed will be subject to vegetation performance standards. Three levels of performance standards have been established in the areas to which they apply. These areas are depicted on Figure 3.
  1. Standard I is intended for areas where there will not be any proposed construction, in areas that were not previously disturbed.
  2. Standard II is intended for areas of proposed construction where invasive species (reed canary grass in particular) already exist. The vegetative performance standard in these areas is a total vegetative aerial coverage of 90% (except where flowing water is present).

3. Standard III is intended for areas of proposed construction, or previous disturbance where invasive species are/were largely absent. The vegetative performance standard in these areas is a total aerial coverage of 90% and less than 5% aerial coverage of invasive species.

- b. Invasive species – Below is a list of species to be observed and controlled under the vegetative performance standards.

|                         |                        |                     |
|-------------------------|------------------------|---------------------|
| 1. Phalaris arundinacea | Reed canary grass      | Extensive in places |
| 2. Pastinaca sativa L.  | Wild parsnip           | Scattered           |
| 3. Cirsium spp.         | Non-native Thistles    | Scattered           |
| 4. Lythrum salicaria    | Purple loosestrife     | None                |
| 5. Agropyron repens     | Quackgrass             | None                |
| 6. Digitaria spp.       | Crabgrass              | None                |
| 7. Rhamnus cathartica   | Common Buckthorn       | None                |
| 8. Rhamnus frangula     | Glossy Buckthorn       | None                |
| 9. Lonicera spp.        | Non-Native Honeysuckle | None                |

- c. Monitoring.

1. Independent construction inspection will be performed periodically throughout the construction process, until final stabilization is in place. Inspections will generally be done once for every three days of site work. Inspection reports will be forwarded to the USEPA and COE within two days of inspection.

EPA: Greg Carlson

Address: US EPA, 77 W. Jackson Blvd. (WW-16J), Chicago, IL 60604

Fax: (312) 886-7804

Email: [Carlson.Greg@epa.gov](mailto:Carlson.Greg@epa.gov)

COE: Bruce Norton

Address: USACE, 1114 South Oak St., LaCrescent, MN 55947-1338

Fax: (507) 895-4116

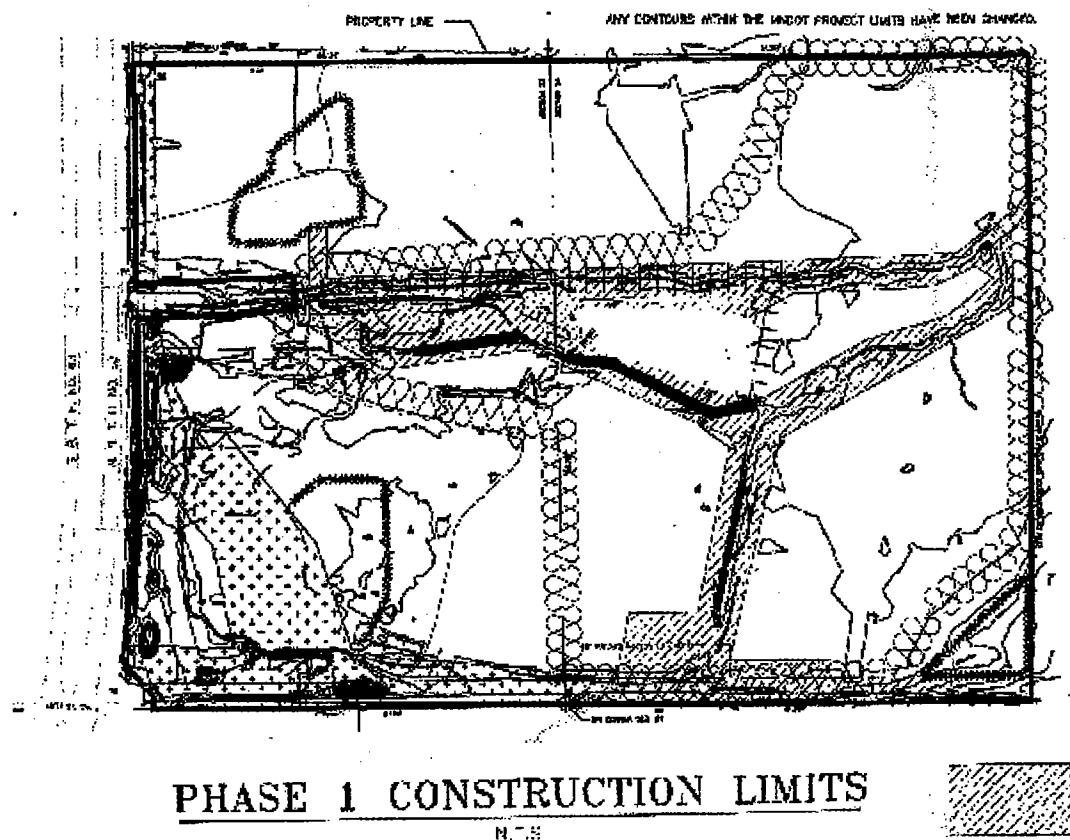
Email: [Bruce.C.Norton@mvp02.usace.army.mil](mailto:Bruce.C.Norton@mvp02.usace.army.mil)

2. Two monitoring wells shall be installed in each of the nine wetland basins at the Rock Dell Farm site to record surface and/or groundwater elevations (total of 18 monitoring wells). One well shall be located at the north end of each basin, and the second well shall be located at the south end of each basin. Water levels shall be recorded every two weeks from the period April 15 through June 1, and then every 30 days until October 1 of each year. This monitoring effort shall be done for a period of five years, with annual reports to be submitted to the EPA and COE (addresses above) by November 15 (within 45 days of completion of hydrology monitoring).

3. An annual vegetation monitoring inspection will be conducted in July, for a period of five years beginning the first full growing season after completion of major earthwork. An annual monitoring report will be submitted to the EPA and COE, at the address above by September 15 (within 45 days of the vegetation monitoring activities).
  - Vegetation performance standards compliance will be evaluated by using five randomly selected, one-meter quadrant sampling frames in each sampling zone<sup>1</sup>. At each sampling point, the dominant vegetation species will be identified. In addition the presence and estimated aerial coverage of any invasive species will be recorded. For purposes of vegetation monitoring, the site(s) will be divided in six sampling zones:
    - B. The South Fork of Willow Creek- Standard II
    - C. Regraded areas of Willow Creek Ditch- Standard II
    - D. Area east of South Fork- Standard III
    - E. Area west of South Fork-Standard III
    - F. Rock Dell Farm wetland basins- Standard III
    - G. Rock Dell Farm buffer areas-Standard III
  - Compliance with the vegetation performance standards will be based on a composite of the species coverage in the samples in any given sampling zone. If the vegetation performance standard for a given sampling zone is not met during any monitoring event, then corrective management action will be recommended to Rochester Topsoil Inc. by the inspector. Rochester Topsoil Inc. will be required to implement these recommendations and documentation of the corrective management actions will be included in the annual monitoring report. Corrective management action recommended by the inspector may include herbicide applications, burning, mowing, manual pulling of invasive plants, and/or reseeding with the MnDoT seed mix specified for the area in the construction plans. If performance standards are not met after the end of the five (5) year monitoring period, then corrective action necessary to achieve these performance standards and the monitoring to track performance will continue until the performance standards are met.
  - Rochester Topsoil Inc. and its principals shall assume all liability for accomplishing corrective work should the District Engineer determine that the compensatory mitigation has not been fully satisfactory. Remedial work may include regrading and/or replanting of the mitigation site, or possibly the development of a new mitigation plan at another site. This responsibility shall extend for a period of five years beginning upon the completion of the mitigation work.

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<sup>1</sup> Rock Dell Farm wetland basins (sampling zone F) will have a total of nine randomly selected, one-meter quadrant samples, with one sample located in each of the marsh basins.

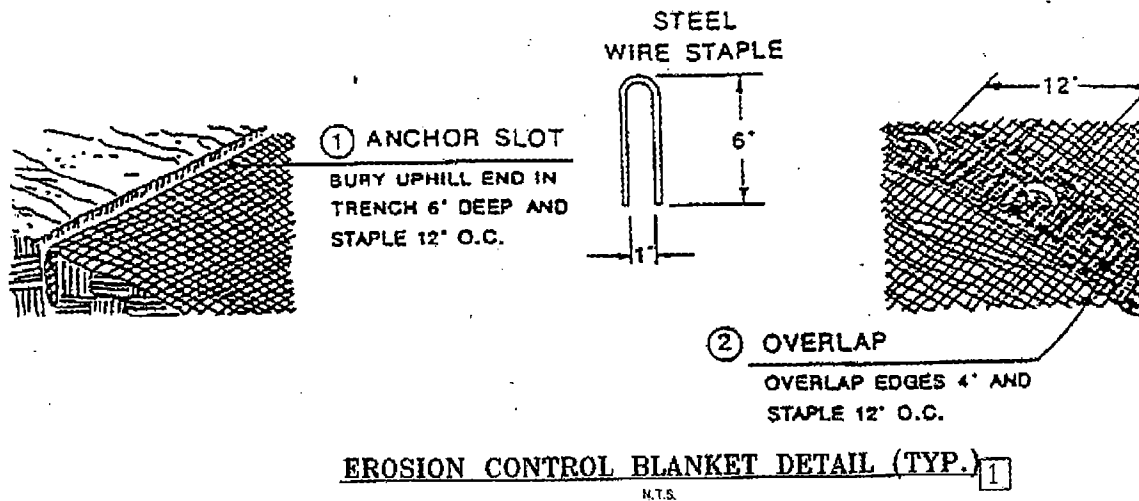


**Figure 1. Construction Limits at the  
Willow Creek Site  
Rochester Topsoil Inc.  
Rochester, Minnesota**



*Graham Environmental Services, Inc.*

GES Project No. 2005.109



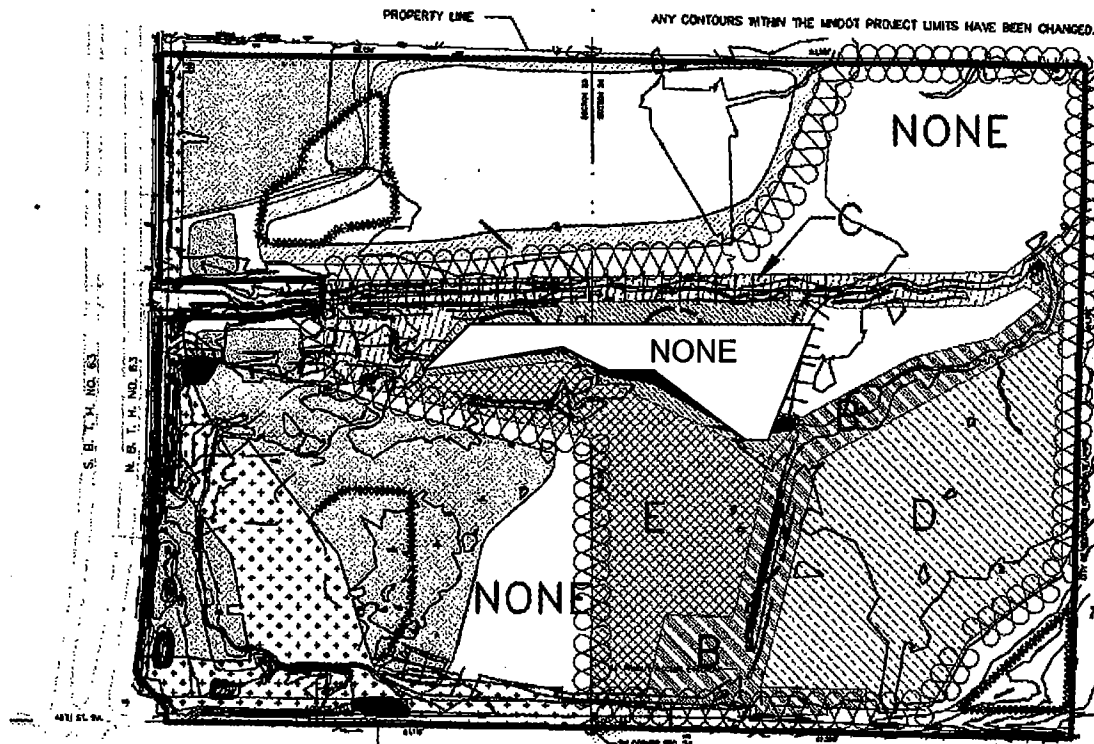
**Figure 2. Erosion Control Blanket Detail**



*Graham Environmental Services, Inc.*

Rochester Topsoil Inc.  
Rochester, Minnesota

GES Project No. 2005.109



### VEGETATION PERFORMANCE STANDARD ZONES

N.T.S.

NONE = STANDARD I OUTSIDE CONSTRUCTION ZONES  
B&C = STANDARD II  
D&E = STANDARD III

**Figure 3. Vegetation Performance  
Standard Zones**

Rochester Topsoil Inc.  
Rochester, Minnesota



GES

*Graham Environmental Services, Inc.*

GES Project No. 2005.109

## **Appendix A**



## **Appendix A**

Rochester Topsoil Inc.  
Willow Creek Restoration and Rock Dell Farm Wetland Mitigation  
Rochester, Minnesota

### **Wetland and Buffer Vegetation Maintenance Plan**

Site grading, seeding, and mulching generally follows MnDOT Specification, which are noted on the Plan sheets. The vegetation maintenance plan below is from the MnDOT Seeding Manual 2003. Reed canary grass control will be performed as required to meet the vegetation standards using the "GBG Protocol" outlined in the 11/21/05 Yaggy Colby letter to Greg Carlson (Appendix E).

#### **Early Maintenance and Evaluation of Native Grass/Forb Plantings**

##### **Year 1**

##### **Establishment (spring seeding):**

- 1) Prepare site – Mid April - June.
- 2) Seed – April 15 - July 20.

##### **Maintenance:**

- 1) Mow (6-10 inches) - July 15 - August 15.
- 2) Mow - September 1 (optional).
- 3) Weed Control - mowing should keep annual weeds down. Spot spray thistles etc.

##### **Establishment (fall seeding):**

- 1) Prepare site - Late August - September.
  - 2) Seed - September 20 to October 20.
- Dormant seed October 20 to November 20.

##### **Maintenance (following season):**

- 1) Mow (6-10 inches) - June 15 - August 15.
- 2) Mow - September 1 (optional).
- 3) Weed Control - mowing should keep annual weeds down. Spot spray thistles etc.

##### **Evaluation:**

- 1) Cover crop growing within 2 weeks of planting (except dormant seedlings).
- 2) Seedlings spaced 1-6 inches apart in drill rows.
- 3) Native grass seedlings may only be 4-6 inches tall.
- 4) If there is a flush of growth from foxtail etc., mow more often.

## **Year 2**

### **Maintenance:**

- 1) Mow (6-10 inches) - June 1 - August 15.
- 2) Mow - September 1 (optional). Burning is also an option
- 3) Weed Control - mowing should keep annual weeds down. Spot spray thistles etc.
- 4) Some sites may not require much maintenance the second year.

### **Evaluation:**

- 1) Cover crop will be gone unless winter wheat was used in a fall planting.
- 2) Grasses forming clumps 1-6 inches apart in drill rows, but still short.
- 3) Some flowers should be blooming (black-eyed susans, bergamot etc.).
- 4) If there is a flush of growth from foxtail etc., mow site.

## **Year 3**

### **Maintenance:**

- 1) Mow only if necessary. Burning is optional.
- 2) Weed Control - Spot spray thistles, etc.
- 3) Sites usually do not require much maintenance the third year.

### **Evaluation:**

- 1) Planting should begin looking like a prairie - tall grasses, flowers etc.

## **Long-term**

### **Maintenance:**

- 1) Mowing - Not necessary or only occasionally.
- 2) Weed Control - Spot spray thistles etc.
- 3) Burning (3-5 year rotation) alternate spring and fall if possible.
- 4) Haying (3-5 year rotation) late summer or early fall. Alternate with burning (may substitute for burning).
- 5) Burning two years in a row will really "clean up" rough-looking sites.

## **Appendix B**

## **Appendix B**

Rochester Topsoil Inc.  
Willow Creek Restoration and Rock Dell Farm Wetland Mitigation  
Rochester, Minnesota

### **Recommended Construction Site Sequencing (Spring Construction)**

1. Notify USEPA and COE five (5) working days prior to beginning of work at the Willow Creek Site.
2. Mobilize necessary equipment, materials, and labor to complete the work.
3. Construct the culvert crossing of Ditch 4.
4. Mow areas along the South Fork of Willow Creek, Ditch 4, and the east end of Willow Creek, where the Barr plan indicates spoil piles to be removed. Also mow east of the South Fork of Willow Creek, along the north side of the accesses road ditch.
5. Remove the remnant spoil piles from the south bank of Willow Creek and east side of the South Fork of Willow Creek, if present. Spoil must be hauled off site or stock piled in a designated upland area for use in filling the "created pond" or Ditch 4.
6. Seed the creek banks and any disturbed areas with the specified seed mixes (note N). Preserve all seed bag tags and provide them to the engineering inspector.
7. Install wood fiber blanket along seeded stream banks. Apply straw mulch per note N to disturbed areas beyond the stream bank.
8. Remove spoil piles along the northern part of the South Fork of Willow Creek. Place spoil on the creek banks to create 2:1 slopes per the Barr plan sheets.
9. Seed the creek banks and any disturbed areas with the specified seed mixes (note N). Preserve all seed bag tags and provide them to the engineering inspector.
10. Install wood fiber blanket along seeded stream banks. Apply straw mulch per note N to disturbed areas beyond the stream bank.
11. Identify areas along the south bank of Willow Creek between the proposed check dam and the confluence with the South Fork of Willow Creek which have a slope steeper than 2:1. Regrade these areas to 2:1 per the Barr plan sheet C-02.
12. Install wood fiber blanket along seeded stream banks. Install rock check dam in Willow Creek at 12+00 as shown in the Barr Engineering Detail 4 on plan sheet C-04.
13. Reestablish flow in Willow Creek by installing a ditch plug at the upstream end of Ditch 4.

14. Seed the creek banks and any disturbed areas with the specified seed mixes (note N). Preserve all seed bag tags and provide them to the engineering inspector.
15. Install wood fiber blanket along seeded stream banks. Apply straw mulch per note N to disturbed areas beyond the stream bank.
16. Remove the culvert crossing of Ditch 4. Fill and regrade Ditch 4 level with the surrounding ground surface. Fill and regrade the "created pond". The source of fill material will be the remnant spoil piles and the stock pile on the site.
17. Seed the creek banks and any disturbed areas with the specified seed mixes (note N). Preserve all seed bag tags and provide them to the engineering inspector.
18. Install wood fiber blanket along seeded stream banks. Apply straw mulch per note N to disturbed areas beyond the stream bank.
19. Install riser pipe on upstream end of pipe below the field access ramp east of the South Fork of Willow Creek. Place spoil piles on the banks of the drainage swale or haul off site.
20. Seed the creek banks and any disturbed areas with the specified seed mixes (note N). Preserve all seed bag tags and provide them to the engineering inspector.
21. Apply straw mulch per note N to disturbed areas beyond the stream bank.
22. Remove any excess spoil material from the construction site to an approved temporary upland stock pile area of off-site. Stabilize the temporary stock pile areas with the use of MnDoT mixture 100 (fall) or 110 (spring or summer) at a rate of 100lbs/ac.
23. The existing stockpile may remain in place for a short duration pending future permit activity. If permitting is not successful, the existing stockpile will be used to fill the "created pond" and excess soil will be placed in an upland area. The disturbed areas will be seeded and stabilized per note N.
24. Notify USEPA of completion of work and demobilize from the Willow Creek site.
25. Notify USEPA and COE five (5) working days prior to beginning of work at the Rock Dell Farm Site.
26. Mobilize necessary equipment, materials, and labor to complete the work.
27. Strip and stock pile topsoil from the wetland mitigation area in designated as Phase I on the MFRA plan sheet 4/4.
28. Grade the mitigation basins as shown on MFRA plan sheet 4/4.
29. Replace eight (8) to ten (10) inches the topsoil in the mitigation basins and the upland berms to establish the finished grades.
30. Install the rock rip-rap overflow structures.
31. Seed any disturbed areas with the specified seed mixes (note N). Preserve all seed bag tags and provide them to the engineering inspector.

32. Apply straw mulch per note N to disturbed areas.
33. Remove any excess spoil material from the construction site to an approved temporary upland stock pile area of off-site. Stabilize the temporary stock pile areas with the use of MnDoT mixture 100 (fall) or 110 (spring or summer) at a rate of 100lbs/ac.
34. Notify USEPA and COE of completion of work and demobilize from the Rock Dell Farm site.

## **Appendix C**

## **Appendix C**

Rochester Topsoil Inc.  
Willow Creek Restoration and Rock Dell Farm Wetland Mitigation  
Rochester, Minnesota

### **Construction Inspection and Reporting Schedule**

A pre-construction meeting will be held before site work begins. In the event of a conflict in the interpretation of the plan requirements, the plans and agreements associated with the Federal consent decree will control the resolution of the issue.

Written notice to USEPA and COE five working days prior to beginning construction.

Periodic construction inspection by Rochester Topsoil Inc.'s consulting engineer/environmental specialist, report to USEPA and COE within two days of inspection.

As-built survey submitted to USEPA and COE within 30 days of completion of earthwork. The as-built survey will include at a minimum:

- Three cross sections of the Willow Creek channel
- Three cross sections of the South Fork of Willow Creek channel
- The location, elevation and dimensions of the ditch plug that is installed to redirect Willow Creek back into its 1950's channel/ditch.
- Rock check dam location, elevation and dimensions
- Location and elevation of the outlet riser on the culvert east of the south end of the South Fork of Willow Creek.
- The bottom elevation of each basin, the area below the overflow elevation, the location, and the elevations and dimensions of the over flow structures on the Rock Dell Farm mitigation site.
- Locations and elevations of the hydrology monitoring wells in the Rock Dell Farm mitigation basins.
- Vegetation sampling zones locations at the Willow Creek and Rock Dell Farm sites.

Written notice to USEPA and COE of completion of construction after final site stabilization.

Annual vegetation monitoring in the month of July during the first growing season after completion of construction and for five consecutive years. Annual hydrology monitoring from April 15 through October 1 during the first growing season after completion of construction and for five consecutive years. Vegetation monitoring reports submitted to USEPA and COE by September 15<sup>th</sup> (within 45 days of



completion of vegetation monitoring activities). Hydrology monitoring reports submitted to USEP and COE by November 15<sup>th</sup> (within 45 days of completion of hydrology monitoring activities).

## **Appendix D**

**Appendix D**

Rochester Topsoil Inc.  
Willow Creek Restoration and Rock Dell Farm Wetland Mitigation  
Rochester, Minnesota

**Construction Compliance Schedule**

| <b>Target Date</b> | <b>Construction Activity</b>  | <b>Dead Line</b> |
|--------------------|---|------------------|
| 4/10/06            | Notify USEPA and COE five days prior to beginning work  | 5/1/06           |
| 4/15/06            | Mobilization and anticipated beginning of work  | 5/6/06           |
| 4/16/06            | Demarcate the limits of the construction areas in the field.<br>Construct culvert Crossing of Ditch 4   | 5/9/06           |
| 5/16-23/06         | Mow areas where spoil piles have been identified or are suspected   | 6/2/06           |
| 5/23-25/06         | Remove remnant spoil piles on south bank of Willow Creek and east side of South Fork, seed & mulch disturbed area   | 6/8/06           |
| 5/25-28/06         | Place spoils along the northern part of the south fork on the banks to create 2:1 slopes, seed, mulch, and install wood fiber blankets  | 6/17/06          |
| 5/28-6/1/06        | Regrade >2:1 slopes on the east end of Willow Creek to 2:1, seed, mulch, and install wood fiber blankets  | 6/26/06          |
| 6/1-2/06           | Install rock check dam, seed, mulch and install wood fiber blankets   | 7/2/06           |
| 6/2-12/06          | Install ditch plug in Ditch 4 to divert flow back into Willow Creek/Ditch: seed, mulch and install wood fiber blanket   | 8/1/06           |
| 6/12-14/06         | Remove Ditch 4 culvert crossing, fill ditch 4, fill "created pond", seed and mulch disturbed area   | 8/7/06           |
| 6/15/06            | Install riser on pipe under field access ramp, remove excess spoil piles, seed and mulch disturbed areas  | 8/10/06          |
| 6/16-18/06         | Remove any excess spoil piles from the site   | 8/16/06          |
| 6/18/06            | Notify USEPA and COE of completion of Willow Creek Site work and beginning of Rock Dell Farm Site work  | 8/19/06          |
| 6/25/06            | Mobilize equipment and begin grading at Rock Dell Farm Site   | 9/1/06           |
| 6/25-7/20/06       | Grading, place rock rip-rap, seeding, mulch, install wood fiber blanket, and remove excess soil. * If seeding is not done by July 20, it can not be planted until after September 20. Install 18 monitoring wells (2 per basin) in the mitigation basins. | 12/1/06          |
| 7/21/06            | Notify USEPA and COE of completion of Rock Dell Farm Work   | 12/2/06          |

|          |   |          |
|----------|---|----------|
| 8/21/06  | Provide As-Built surveys to USEPA and COE                         | 1/2/07   |
| 7/31/07  | Complete first year of field vegetation monitoring                | 7/31/07  |
| 9/15/07  | Submit first annual vegetation monitoring report to USEPA and COE | 9/15/07  |
| 10/1/07  | Complete first year of field hydrology monitoring                 | 10/1/07  |
| 11/15/07 | Submit first annual hydrology monitoring report to USEPA and COE  | 11/15/07 |
| 7/31/08  | Complete second year of field vegetation monitoring               | 7/31/08  |
| 9/15/08  | Submit first annual vegetation monitoring report to USEPA and COE | 9/15/08  |
| 10/1/08  | Complete second year of field hydrology monitoring                | 10/1/08  |
| 11/15/08 | Submit second annual hydrology monitoring report to USEPA and COE | 11/15/08 |
| 7/31/09  | Complete third year of field vegetation monitoring                | 7/31/09  |
| 9/15/09  | Submit first annual vegetation monitoring report to USEPA and COE | 9/15/09  |
| 10/1/09  | Complete third year of field hydrology monitoring                 | 10/1/09  |
| 11/15/09 | Submit third annual hydrology monitoring report to USEPA and COE  | 11/15/09 |
| 7/31/10  | Complete fourth year of field vegetation monitoring               | 7/31/10  |
| 9/15/10  | Submit first annual vegetation monitoring report to USEPA and COE | 9/15/10  |
| 10/1/10  | Complete fourth year of field hydrology monitoring                | 10/1/10  |
| 11/15/10 | Submit fourth annual hydrology monitoring report to USEPA and COE | 11/15/10 |
| 7/31/11  | Complete fifth year of field vegetation monitoring                | 7/31/11  |
| 9/15/11  | Submit first annual vegetation monitoring report to USEPA and COE | 9/15/11  |
| 10/1/11  | Complete fifth year of field hydrology monitoring                 | 10/1/11  |
| 11/15/11 | Submit fifth annual hydrology monitoring report to USEPA and COE  | 11/15/11 |

## **Appendix E**



ASSOCIATES

ENGINEERS

ARCHITECTS

LANDSCAPE ARCHITECTS

SURVEYORS

PLANNERS

Rochester Office  
717 Third Avenue SE  
Rochester, MN 55904  
507-288-6464  
507-288-5058 Fax

St. Paul Office  
651-681-8040

Hastings Office  
651-437-2909

Mason City Office  
641-424-6344

Delaford Office  
262-646-6855

November 21, 2005

Mr. Greg Carlson  
US EPA  
77 West Jackson Boulevard (WW-16J)  
Chicago, IL 60604

**RE: Rochester Topsoil Site (Prow Property)  
Willow Creek Restoration  
Rochester, Minnesota**

Dear Mr. Carlson:

Mr. Don Prow requested Yaggy Colby Associates provide wetland analysis for the Rochester Topsoil property on the east side of South Highway 63 in Rochester, Minnesota. The initial work we have performed for Mr. Prow consisted of a site visit to determine the status of wetland vegetation in a number of areas.

Mr. Skip Langer, from the Olmsted County Soil & Water Conservation District, was in attendance for this site visit. The visit occurred on November 1, 2005, and the areas of investigation were Ditches 1, 2 and 3, and the wetland area to the west of Ditch 3 as identified on the Barr Engineering "Rochester Topsoil, Inc., Wetland Restoration" Site Plan dated October 25, 1999 (revised 1/19/00) sheet C-01 (Barr project no. 23/55-055LJK010). The area west of Ditch 3 is also identified as Area E in Figure 3 from the Graham Environmental Services (GES), Inc. Report dated October 4, 2005 (please see attached copy).

Ditch 1 and Ditch 2 were investigated for invasive species (please see attached list) and they appear to have been established with less than 5% invasive species (standard to meet in the GES Report. Ditch 3 also meets the vegetative standards as spelled out in the GES Report requiring 90% aerial coverage.

Area E has areas dominated (severe infestation approaching 100%) by *Phalaris arundinacea* (reed canary grass). This species is very difficult to remove because of its widespread population in drainage ways upstream of this property (allowing re-establishment as seeds flow to the site), and competitive dense growth and expansion by seed and rhizomes. As the reed canary grass has been present for more than 3 years a seed bank has developed exacerbating the situation.

Because of the competitive nature of reed canary grass, it is very difficult to eradicate. Even with several herbicide applications over several years there is no guarantee of eradication. One option for eradication is excavating the rhizomatous root system and seed base and disposing off site. On this site we do not recommend mechanical excavation because the site would be lowered approximately one to two feet (dependent on root zone depth), which could alter surrounding wetlands and would be very expensive on this larger site.

Mr. Greg Carlson  
November 21, 2005  
Page 2

Yaggy Colby Associates recommends using the Minnesota Board of Water & Soil Resources (BWSR) Guidelines For Restoring & Managing Native Wetland Vegetation (Jacobson, R.L., March 2005) "GBG Protocol" for eradication (please see attached). As mentioned in this protocol, herbicide should be applied in the fall followed by burning in the fall or next spring. Burning has been shown to help with reduction of the seed bank and stimulate growth for further herbicide application. Herbicide should be applied following burning the next spring as reed canary grass emerges. As no standing water was observed, a herbicide such as RoundUp may be applied, but if standing water is present on the application sites Rodeo or other aquatically labeled glyphosate should be used. Prior to application of herbicide in the fall and spring the applier and/or inspector must verify that the reed canary grass is physiologically active.

Following the "GBG Protocol" the recommended seeding approach should follow BWSR's "Post-herbicide Treatment Planting" (please see attached). Spring seeding should be done at a minimum with the WT1 seed mix. Evaluation of the growth this first season will determine if an additional herbicide treatment is needed or if spot treatment is acceptable. Additional maintenance is listed in Appendix A of the GES Report.

At least 2 years of spot spraying of herbicide is recommended following seeding using Assure II (Quizalofop P-Ethyl), or equivalent, to control re-infestation of reed canary grass. Permanent wetland seed mix is identified in the GES Report as MnDOT seed mix 26B. Because of the sites placement downstream of areas infested with reed canary grass long-term viability of the restoration is questionable.

It is our understanding that Mr. Don Prow will use Yaggy Colby Associates for inspection/observation of the wetland restoration required. Digital photos were taken of the Ditches investigated and Area E if you need additional information. Please call if you have any questions or concerns.

Sincerely,

**YAGGY COLBY ASSOCIATES**



Wade DuMond, ASLA  
Department Head of Planning & Landscape Architecture

YCA #9402 LD2  
Attachments

cc: Don Prow  
Dan Berndt  
Kelly Bopray  
Skip Langer  
Joshua Levin  
Mary Kells  
Robert Smith

**Rochester Topsoil Site – Attachment**  
November 21, 2005

**Invasive Species**

Phalaris arundinacea (reed canary grass)  
Pastinaca sativa L. (wild parsnip)  
Cirsium spp. (non-native thistles)  
Lythrum salicaria (purple loosestrife)  
Agropyron repens (quackgrass)  
Digitaria sp. (crabgrass)  
Rhamnus cathartica (common buckthorn)  
Rhamnus frangula (glossy buckthorn)  
Lonicera spp. (non-native honeysuckle)

**GBG (Glyphosate, Burn, Glyphosate) Protocol** – Glyphosate (RoundUp or Rodeo) is a non-selective contact herbicide. It will kill anything green it touches (although there are some resistant species). The recommended way to eradicate RCG with glyphosate is to spray in the fall, burn off the dead thatch over the winter or in early spring, and then spray again to kill seedlings germinating from the seedbank. This method is best used on severe infestations and large patches. Visible affects should be seen within 7-10 days. Timing of activities is extremely important for this protocol to work effectively (see Figure 2). Treatment must start in the fall and the RCG must be physiologically active and will kill nearly 100% of the existing mature RCG. The burn should be done 30+ days after the fall glyphosate treatment. It won't affect any RCG that may have survived the fall herbicide treatment but may affect the seedbank. The second glyphosate treatment is then done in the spring when the RCG seedbank begins to germinate and grow. As stated, timing is extremely important, this protocol does not work well if it is started in the spring. Spring treatment of severe infestations and large patches is not recommended.

**Post-herbicide Treatment Planting** – The herbicides discussed above are contact herbicides so planting can occur soon after treatment if desired. We have approached planting in several ways. One way is to plant using a temporary cover (WT1) with the intent that the site be evaluated for the effectiveness of the herbicide treatment and RCG re-establishment before planting the more expensive permanent seed mixture (W2, W3, etc.). If more treatment is necessary it can be performed and then the permanent seed mix can be installed by broadcasting directly into the WT1. We have also planted the permanent seed mixture immediately following RCG treatment with reasonable success.

**Mixture WT1 (Wetland Temporary)**

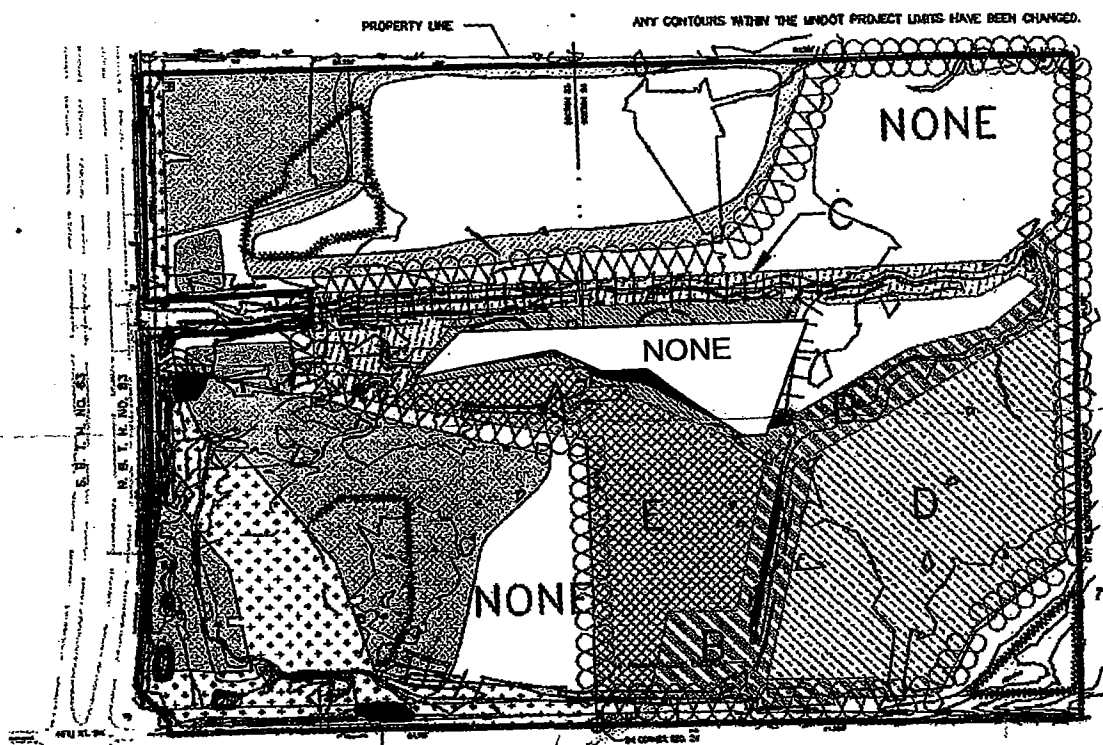
**Common Name; Botanical Name; % of Mix**

Slough grass, American; *Beckmannia syzigachne*; 30.00  
Rye-grass, annual; *Lolium italicum*; 40.00  
Bluegrass, fowl; *Poa palustris*; 30.00

**Total: 100.00**

**Rate: 20.0 PLS lbs/acre**





### VEGETATION PERFORMANCE STANDARD ZONES

N.T.S.

NONE = STANDARD I OUTSIDE CONSTRUCTION ZONES  
B&C = STANDARD II  
A,D&E = STANDARD III

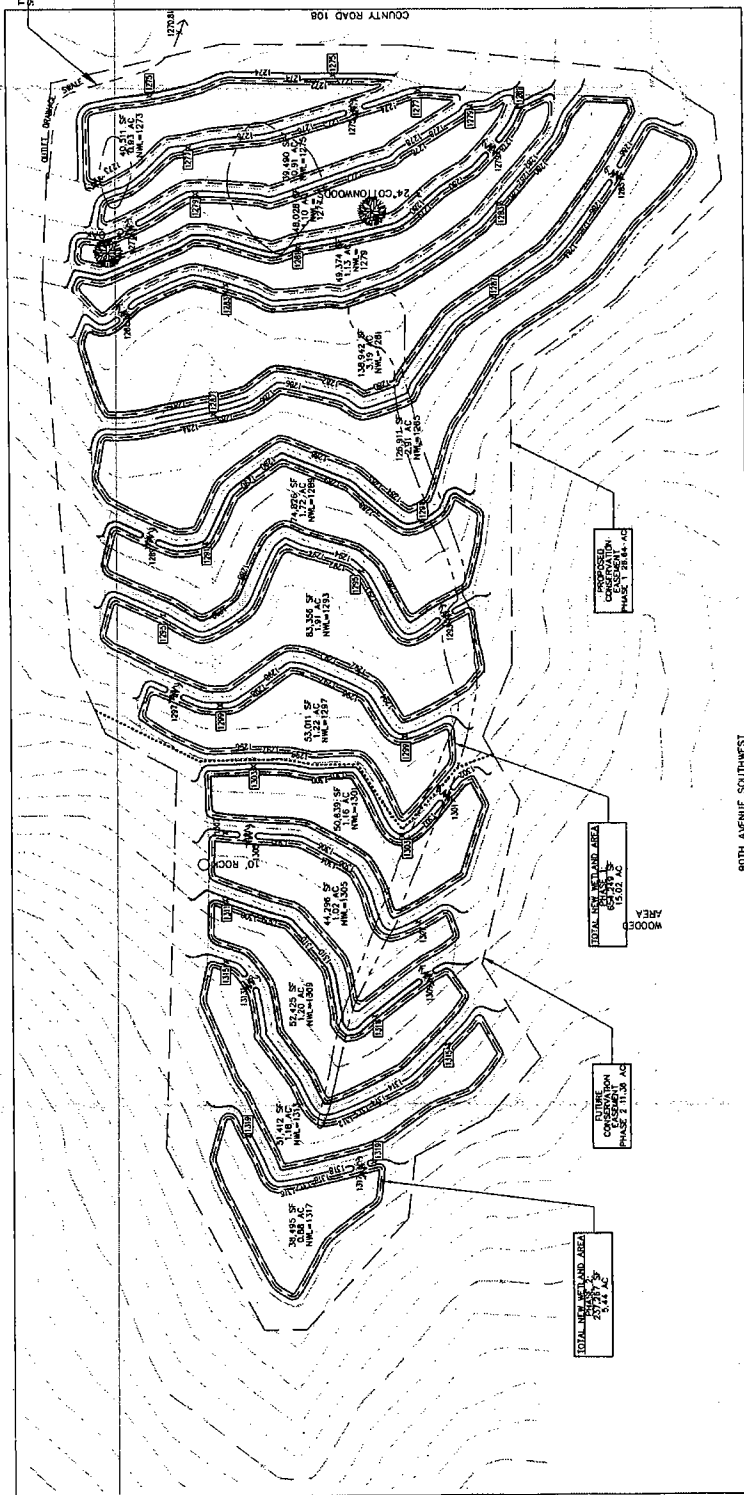
**Figure 3. Vegetation Performance  
Standard Zones**

Rochester Topsoil Inc.  
Rochester, Minnesota

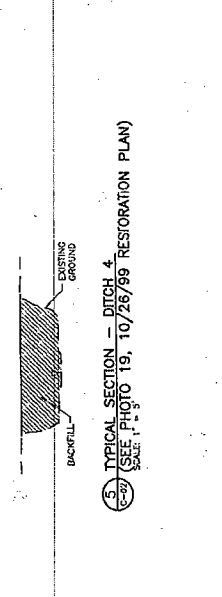
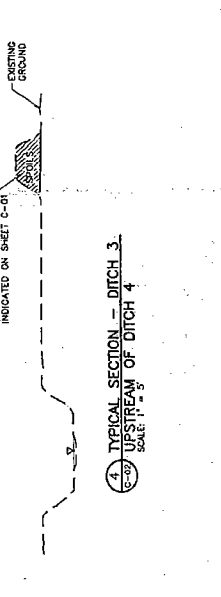
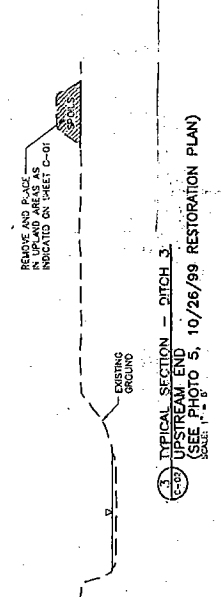
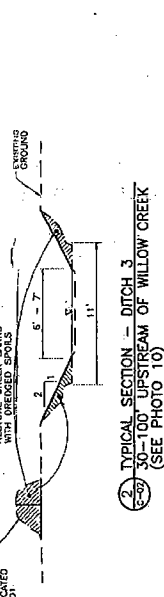
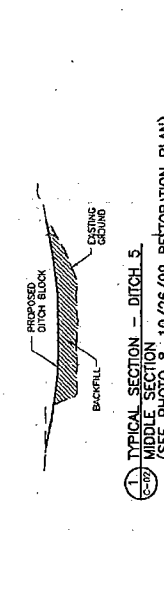
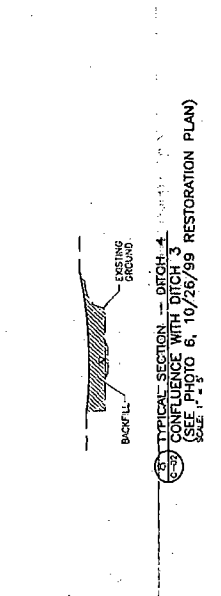
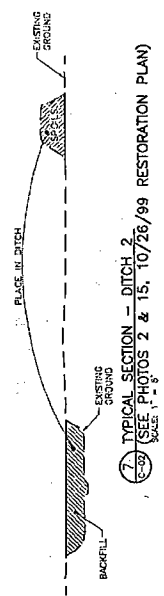
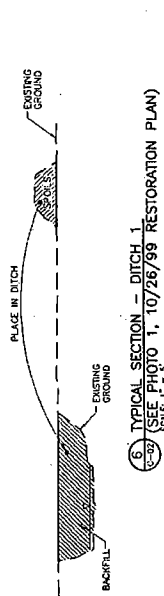
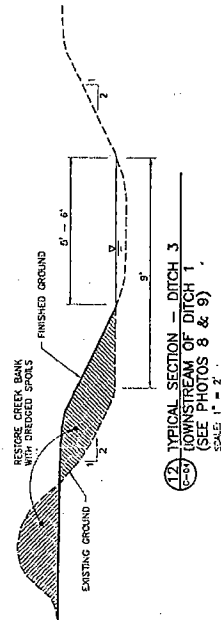
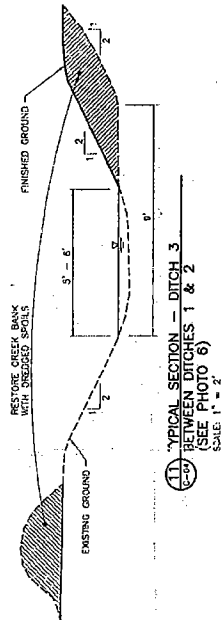
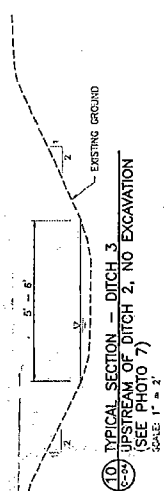
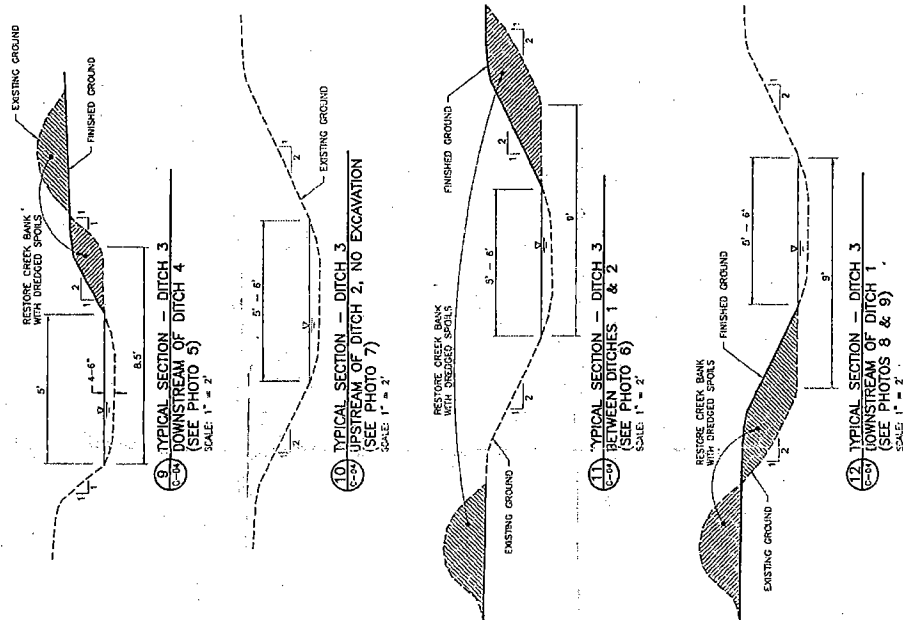


*Graham Environmental Services, Inc.*

GES Project No. 2005.109



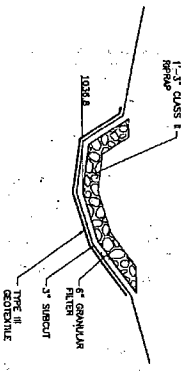
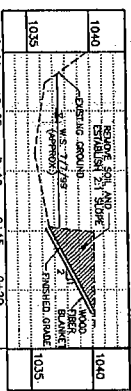
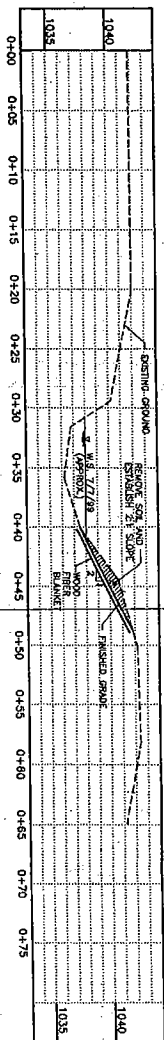
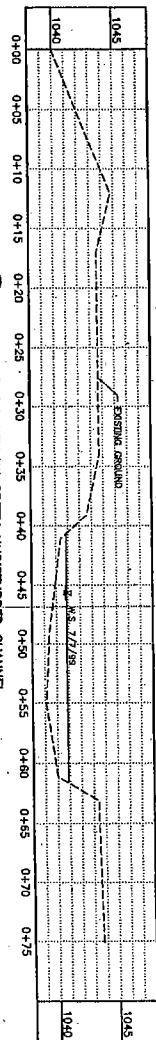
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|-----|-----|-----|-----|----------|--|
| NO. | BY  | CHK | APP | DATE     | REVISION DESCRIPTION   |
| 1   | BAR |     |     | 10/23/98 | FOR SOILS, ROCK, AND GROUNDWATER, 1. RESTORATION, 2. WETLANDS, 3. UPLANDS, 4. DEWATERING, 5. DITCHES, 6. DRAINAGE, 7. EROSION CONTROL, 8. FLOOD CONTROL, 9. LANDSCAPE, 10. PLANTING, 11. MONITORING, 12. MAINTENANCE, 13. RECORDS, 14. AS-BUILT, 15. FINAL, 16. CLOSURE, 17. ABANDONMENT, 18. DECOMMISSIONING, 19. REMEDIATION, 20. RESTORATION, 21. WETLANDS, 22. UPLANDS, 23. DEWATERING, 24. DRAINAGE, 25. EROSION CONTROL, 26. FLOOD CONTROL, 27. LANDSCAPE, 28. PLANTING, 29. MONITORING, 30. MAINTENANCE, 31. RECORDS, 32. AS-BUILT, 33. FINAL, 34. CLOSURE, 35. ABANDONMENT, 36. DECOMMISSIONING, 37. REMEDIATION, 38. RESTORATION, 39. WETLANDS, 40. UPLANDS, 41. DEWATERING, 42. DRAINAGE, 43. EROSION CONTROL, 44. FLOOD CONTROL, 45. LANDSCAPE, 46. PLANTING, 47. MONITORING, 48. MAINTENANCE, 49. RECORDS, 50. AS-BUILT, 51. FINAL, 52. CLOSURE, 53. ABANDONMENT, 54. DECOMMISSIONING, 55. REMEDIATION, 56. RESTORATION, 57. WETLANDS, 58. UPLANDS, 59. DEWATERING, 60. DRAINAGE, 61. 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FLOOD CONTROL, 1125. LANDSCAPE, 1126. PLANTING, 1127. MONITORING, 1128. MAINTENANCE, 1129. RECORDS, 1130. AS-BUILT, 1131. FINAL, 1132. CLOSURE, 1133. ABANDONMENT, 1134. DECOMMISSIONING, 1135. REMEDIATION, 1136. RESTORATION, 1137. WETLANDS, 1138. UPLANDS, 1139. DEWATERING, 1140. DRAINAGE, 1141. EROSION CONTROL, 1142. FLOOD CONTROL, 1143. LANDSCAPE, 1144. PLANTING, 1145. MONITORING, 1146. MAINTENANCE, 1147. RECORDS, 1148. AS-BUILT, 1149. FINAL, 1150. CLOSURE, 1151. ABANDONMENT, 1152. DECOMMISSIONING, 1153. REMEDIATION, 1154. RESTORATION, 1155. WETLANDS, 1156. UPLANDS, 1157. DEWATERING, 1158. DRAINAGE, 1159. EROSION CONTROL, 1160. FLOOD CONTROL, 1161. LANDSCAPE, 1162. PLANTING, 1163. MONITORING, 1164. MAINTENANCE, 1165. RECORDS, 1166. AS-BUILT, 1167. FINAL, 1168. CLOSURE, 1169. ABANDONMENT, 1170. DECOMMISSIONING, 1171. REMEDIATION, 1172. RESTORATION, 1173. WETLANDS, 1174. UPLANDS, 1175. DEWATERING, 1176. DRAINAGE, 1177. EROSION CONTROL, 1178. FLOOD CONTROL, 1179. LANDSCAPE, 1180. PLANTING, 1181. MONITORING, 1182. MAINTENANCE, 1183. RECORDS, 1184. AS-BUILT, 1185. FINAL, 1186. CLOSURE, 1187. ABANDONMENT, 1188. DECOMMISSIONING, 1189. REMEDIATION, 1190. RESTORATION, 1191. WETLANDS, 1192. UPLANDS, 1193. DEWATERING, 1194. DRAINAGE, 1195. EROSION CONTROL, 1196. FLOOD CONTROL, 1197. LANDSCAPE, 1198. PLANTING, 1199. MONITORING, 1200. MAINTENANCE, 1201. RECORDS, 1202. AS-BUILT, 1203. FINAL, 1204. CLOSURE, 1205. ABANDONMENT, 1206. DECOMMISSIONING, 1207. REMEDIATION, 1208. RESTORATION, 1209. WETLANDS, 1210. UPLANDS, 1211. DEWATERING, 1212. DRAINAGE, 1213. EROSION CONTROL, 1214. FLOOD CONTROL, 1215. LANDSCAPE, 1216. PLANTING, 1217. MONITORING, 1218. MAINTENANCE, 1219. RECORDS, 1220. AS-BUILT, 1221. FINAL, 1222. CLOSURE, 1223. ABANDONMENT, 1224. DECOMMISSIONING, 1225. REMEDIATION, 1226. RESTORATION, 1227. WETLANDS, 1228. UPLANDS, 1229. DEWATERING, 1230. DRAINAGE, 1231. EROSION CONTROL, 1232. FLOOD CONTROL, 1233. LANDSCAPE, 1234. PLANTING, 1235. MONITORING, 1236. MAINTENANCE, 1237. RECORDS, 1238. AS-BUILT, 1239. FINAL, 1240. CLOSURE, 1241. ABANDONMENT, 1242. DECOMMISSIONING, 1243. REMEDIATION, 1244. RESTORATION, 1245. WETLANDS, 1246. UPLANDS, 1247. DEWATERING, 1248. DRAINAGE, 1249. EROSION CONTROL, 1250. FLOOD CONTROL, 1251. LANDSCAPE, 1252. PLANTING, 1253. MONITORING, 1254. MAINTENANCE, 1255. RECORDS, 1256. AS-BUILT, 1257. FINAL, 1258. CLOSURE, 1259. ABANDONMENT, 1260. DECOMMISSIONING, 1261. REMEDIATION, 1262. RESTORATION, 1263. WETLANDS, 1264. UPLANDS, 1265. DEWATERING, 1266. DRAINAGE, 1267. EROSION CONTROL, 1268. FLOOD CONTROL, 1269. LANDSCAPE, 1270. PLANTING, 1271. MONITORING, 1272. MAINTENANCE, 1273. RECORDS, 1274. AS-BUILT, 1275. FINAL, 1276. CLOSURE, 1277. ABANDONMENT, 1278. DECOMMISSIONING, 1279. REMEDIATION, 1280. RESTORATION, 1281. WETLANDS, 1282. UPLANDS, 1283. DEWATERING, 1284. DRAINAGE, 1285. EROSION CONTROL, 1286. FLOOD CONTROL, 1287. LANDSCAPE, 1288. PLANTING, 1289. MONITORING, 1290. MAINTENANCE, 1291. RECORDS, 1292. AS-BUILT, 1293. FINAL, 1294. CLOSURE, 1295. ABANDONMENT, 1296. DECOMMISSIONING, 1297. REMEDIATION, 1298. RESTORATION, 1299. WETLANDS, 1300. UPLANDS, 1301. DEWATERING, 1302. DRAINAGE, 1303. EROSION CONTROL, 1304. FLOOD CONTROL, 1305. LANDSCAPE, 1306. PLANTING, |




**NOTE:**  
INSTALL AND STAPLE MADOT 1885 HIGH VELOCITY OR REGULAR  
EROSION CONTROL BLANKET WITH BACKING ON BOTH SIDES  
ON ALL RESTORED SIDE SLOPES OF DITCH.

[illegible]





- NOTES:**
1. WHERE STILES BANK ON HILLTOP, CHECK DEPTH OF SCOUR BANK. RECORD DEPTH OF SCOUR AND PERCENT OF CLEARED SECTION (APPROX. 50% 12-80 TO STA. 33+80).
  2. UPON COMPLETION OF GRADING, IMMEDIATELY SEED ALL DISBURBED AREAS WITH CRACKED BARK MIXES WITH OTHER COARSESTRAINING OF 25% BARK AND (40% GRASS) AND 5% OR MORE ANNUAL PRICES (LATHAM ADDITION).
  3. CHECK DRAIN FIELDS FOR APPROXIMATELY 6" OF SETTLING.
  4. CONSTRUCT ANTIPOD DRAIN DURING LOW FLOWS.

|                 |  |      |                    |  |      |  |          |  |   |  |  |  |                                |  |  |  |   |  |  |  |  |  |  |  |                              |  |
|-----------------|--|------|--------------------|--|------|--|----------|--|---|--|--|--|--------------------------------|--|--|--|---|--|--|--|--|--|--|--|------------------------------|--|
| NOT BY BOOK/APP |  | DATE | REGION DESCRIPTION |  | DATE |  | REG. NO. |  | I HEREBY CERTIFY THAT THE PLAN WAS PREPARED BY ME OR UNDER MY DIRECT SUPERVISION AND THAT I AM A LICENSED PROFESSIONAL ENGINEER AND ARCHITECT UNDER THE LAWS OF THE STATE OF MINNESOTA. |  | COUNTY<br>DISTRICT<br>RELEASED 10/7/98 |  | A B C 0 1 2 3<br>DATE RELEASED |  |  BARR<br>MINNEAPOLIS, MINNESOTA<br>ST. BEAUNE, MINNESOTA<br>ANN ARBOR, MINNESOTA<br>JEFFERSON CITY, MINNESOTA |  | Scale: AS SHOWN<br>North<br>Project: BARR<br>Record<br>Approved |  | ROCHESTER TOPSOIL, INC.<br>ROCHESTER, MN |  | WILLOW CREEK RESTORATION PLAN<br>ROCHESTER, MINNESOTA<br>WILLOW CREEK CROSS-SECTIONS |  | BARR PROJECT NO.<br>23,555-0551.0K<br>CLIENT PROJECT NO. |  | DWG. No.<br>C-04<br>REV. No. |  |
|-----------------|--|------|--------------------|--|------|--|----------|--|---|--|--|--|--------------------------------|--|--|--|---|--|--|--|--|--|--|--|------------------------------|--|



UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No.05-CV-01452 RHK/JSM

|                                |   |                       |
|--------------------------------|---|-----------------------|
| UNITED STATES OF AMERICA,      | ) |                       |
|                                | ) |                       |
| Plaintiff,                     | ) |                       |
|                                | ) |                       |
| v.                             | ) | <b>CERTIFICATE OF</b> |
|                                | ) | <b>SERVICE</b>        |
| DON PROW, individually and     | ) |                       |
| d/b/a Rochester Topsoil, Inc.; | ) |                       |
| BRYCE PROW, individually and   | ) |                       |
| d/b/a Rochester Topsoil, Inc.; | ) |                       |
| and ROCHESTER TOPSOIL, INC.,   | ) |                       |
|                                | ) |                       |
| Defendants.                    | ) |                       |

I hereby certify that on March 2, 2006, I caused the following documents:

NOTICE OF LODGING OF PROPOSED CONSENT DECREE; proposed CONSENT DECREE BETWEEN UNITED STATES AND DONALD LEE PROW, individually and d/b/a ROCHESTER TOPSOIL, INC.; DONALD BRYCE PROW, individually and d/b/a/ ROCHESTER TOPSOIL, INC.; and ROCHESTER TOPSOIL, INC. (including the Consent Decree in 31 pages, Creation and Grant of Covenants, and Work Plan with six drawings); CERTIFICATE OF SERVICE

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

**Daniel E Berndt;** deb@dunlaplaw.com

**Joshua M Levin;** joshua.levin@usdoj.gov

Dated: March 2, 2006

s/ Holly Fetzer  
Holly Fetzer